No. 16,469

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as LAKE MOTORS and STUDEBAKER SALES AND SERVICE, and STUDEBAKER PACKARD SALES AGENCY,

Appellee.

APPELLEE'S ANSWERING BRIEF.

HAWKINS, CANNON & HAWKINS,
By GORDON L. HAWKINS,
112 North Third Street, Las Vegas, Nevada,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

INDEX

Table of Cases

Statutes

Miscellaneous

No. 16,469

IN THE

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as LAKE MOTORS and STUDEBAKER SALES AND SERVICE, and STUDEBAKER PACKARD SALES AGENCY,

Appellee.

APPELLEE'S ANSWERING BRIEF.

STATEMENT OF THE CASE.

Petitioning creditors filed an original petition to declare Charles J. Ketcham an involuntary bankrupt on March 1, 1957, alleging that Charles J. Ketcham "has had his principal place of business within the above judicial district." (R 3-6.)

Charles J. Ketcham's answer was filed on March 8, 1957, alleging that for more than six months prior to March 1, 1957, he had not had his residence within

Nevada, and denying that he had had his principal place of business within the district within six months prior to March 1, 1957. (R 7-9.)

On or about April 13, 1957, the petitioning creditors filed an amended and supplemental petition without changing any material allegation of the original petition. (R 15-18.)

On the 15th day of April, 1957, a hearing was held by the Hon. John C. Mowbray, Referee, upon the original petition and the amended and supplementary petition and the answer of Charles J. Ketcham thereto. (R 49-93.)

At the said hearing the only evidence introduced as to the residence and place of business of the alleged bankrupt was that he resided at Las Vegas, Nevada, from April 10, 1952, to November 15, 1955, and operated a business in Las Vegas and Henderson, Nevada, during the same period of time. (R 58.)

The alleged bankrupt resided at San Bernardino, California, from December 7, 1955, to the date of the hearing. (R 64.)

At the time of the hearing, the Referee also considered the second amended and supplemental petition of the petitioning creditors. (R 19-22; R 41.)

Thereafter and on the 18th day of June, 1957, the Referee entered his order dismissing the petition (R 23) and on August 14, 1957, filed his Findings of Fact and Conclusions of Law which are not included in the record. From this Order the petitioning creditors filed a petition for review which was denied without

prejudice by this Honorable Court's order of September 9, 1957, as modified on October 8, 1957. (R 33 and 35-37.)

ARGUMENT.

I. THE JUDGMENT OF DISMISSAL SHOULD BE AFFIRMED.

The Referee found (R 23) that the alleged bankrupt had not resided within the District of Nevada and had no principal place of business within the District of Nevada within six months prior to the date of the filing of the petition and that he was a resident of the United States and resided and had a principal place of business within the United States and outside the District of Nevada for the same six months period prior to the date of filing the petition.

On a petition for review the District Judge sits as a Court of Appeal and shall accept the Referee's findings unless clearly erroneous. (General Order 47.)

The Referee concluded as a matter of law that the Court was without jurisdiction and dismissed the petition.

The jurisdiction of the bankruptcy Court is outlined in Section 2 of the Bankruptcy Act (USCA Title 11, Sec. 11), as follows:

> "* * * within their territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction * * * to * * * (1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months,

> or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions, or in any cases transferred to them pursuant to this Act;".

It is quite evident that the alleged bankrupt does not fall within any of the classes set forth in this Section.

However, the appellants claim that this Court should retain jurisdiction because of Section 32 of the Bankruptcy Act. (USCA, Title 11, Section 55.)

This section does not confer jurisdiction in any case not provided for by the aforesaid Section 2, but provides for *transfer* by the *Judge* upon timely objection or application.

The appellants requested that the lower Court *retain* jurisdiction of this case even though they acknowledge that the jurisdictional elements are lacking. They cite as supporting authority *In re Fada Radio & Electric Co.,* 132 F. Sup. 89, and *In re Martinez,* 241 F.2d 345, as supporting their theory.

In the *Fada* case, the Court, while stating that the petition was wrongly filed, assumed that it could retain the case, but, in fact, transferred it to a Court it could be properly brought in.

The lower Court in the *Martinez* case (140 F. Supp. 221) held that Section 2 set forth its jurisdiction and it was powerless to do anything but dismiss the case.

The Court of Appeals held, however, by changing the word "jurisdiction" in Section 2 to the word "venue" that the Court the petitions were originally filed in could retain jurisdiction and adjudge the petitioner a bankrupt.

One large distinction lies between the instant case and the *Fada* and *Martinez* cases above. In both of those cases, the matter involved a *voluntary* petition while this case involves an involuntary petition. The Court in the *Martinez* case said (241 F.2d 345, 349):

> "Obviously, the power of the Court in its discretion to retain the proceedings must be based on the theory of *consent* or *waiver*" (Emphasis added).

There is certainly no consent or waiver in the instant case.

A diligent search of the reports fails to disclose any case directly in issue involving an involuntary petition.

In any event, the Referee was unable to do anything but dismiss, since even under Section 32 (USCA Title 11, Section 55) any *transfer* must be made by the Judge, and no application to *transfer* has been made to the Judge.

II. APPELLANTS HAVE APPEALED FROM THE WRONG ORDER.

The appellants filed their petition to review on July 6, 1957. (R 27.) The Judge entered his order denying

the prayer of the petition on September 9, 1957. (R 33.) Appellants filed their motion to vacate this order on September 24, 1957. (R 34.) On this motion the Judge entered his order modifying the previous order to read:

> "Ordered, that each of said petitions, be, and they are hereby, dismissed without prejudice, it appearing that the Court has no jurisdiction to hear the matters presented in the petitions at this time." (R 36.)

No appeal or further modification was sought by appellants and no new petitions were filed. Thereafter the Judge said,

> "the Court will assume that the petition for review was properly filed with the Referee in the first instance." (R 43.)
>
> "It is to be noted here that even though the two petitions hereinabove referred to were dismissed without prejudice * * *, no further petition has been filed in this matter. In short, petitioners have done nothing more than ask that the corpse of their original petition for review be exhumed and revivified." (R 44-45.)

Appellants argue here that the petition for review should be heard on its merits. This remedy should have been sought by appeal from either the order of September 9, 1957, or of October 8, 1957, and not by appeal as in the present appeal. The appellants are too late to review the reasons for the Judge's dismissal of the petition, and having been dismissed, the Judge was correct in holding that there was nothing for him to act upon.

III. THE SALE SHOULD NOT BE SET ASIDE.

Section 39(c) (USCA, Title 11, Section 67(c)) provides that any person aggrieved by an order of the Referee may file a petition for review and "upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Court upon such terms as will protect the rights of all parties in interest."

The Referee's order was entered on June 18, 1957 (R 23), and served upon attorneys for appellants on June 25, 1957. (R 31.) The petition for review was filed on July 6, 1957. (R 24-27.) Nowhere in the record is there application for a stay order, either to the Referee or to the Judge.

Upon dismissal of a petition, any injunction based thereon is vacated as a matter of law. (43 CJS 984, Sec. 244.)

The cases cited by appellants state correct law, when there is an injunction in force. The rule is different when an injunction is not in existence.

CONCLUSION.

This Honorable Court should affirm the order of the District Judge.

Dated, Las Vegas, Nevada,
February 17, 1961.

Respectfully submitted,
HAWKINS, CANNON & HAWKINS,
By GORDON L. HAWKINS,
Attorneys for Appellee.